

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

JUL 11 1990

WARREN L. TAYLOR, CLERK

By: 5 Deputy Clerk

In Re:

Case No. A-B-89-10703
Chapter 11

R. BRUCE FULLER and wife,
DIANNE B. FULLER,

Debtors.

JUDGMENT ENTERED ON 7-11-90

ORDER

This case was heard before the court on the objection of R. Bruce Fuller and wife, Dianne B. Fuller (hereinafter "debtors") to the claim of Edward C. Pennebaker, O.I. Pennebaker, George Ann Pennebaker and the Estates of A.E. Pennebaker (hereinafter "Pennebakers"). Based on the evidence presented by both sides, a review of the file, and a proceeding in which the court heard and read the stipulations of the parties and arguments of counsel for both sides, the court makes the following:

FINDINGS OF FACT

1. The debtors filed a voluntary Petition for Reorganization under Chapter 11 of the United States Bankruptcy Code on November 14, 1989.
2. The original schedules of the debtors reflected a claim by the Pennebakers in the amount of \$290,000.00 and showed that claim as being contested.
3. The Pennebakers filed a Proof of Claim in this matter in the amount of \$303,495.61.
4. Debtors filed an objection to said claim. Subsequently, the parties appeared before the court and were represented by

counsel. The court had jurisdiction over the parties and the subject matter hereof.

5. On or about July 11, 1986, the debtors executed a Promissory Note in the face amount of \$596,000.00 to the Pennebakers, a copy of which is attached to the Proof of Claim filed by the Pennebakers.

6. The terms of said Promissory Note state that payments shall be made monthly and that beginning with the first monthly payment due on August 1, 1986, through the payment which was due on July 1, 1988 that the payments shall be of interest only, calculated at the rate of 9% per annum, requiring payments during said period in the amount of \$4,470.00 per month.

7. Beginning with the payment due on August 1, 1988, the debt evidenced by the Promissory Note carried a rate of interest on the outstanding unpaid balance of the debt equal to the prime rate plus 1-1/2% or 10% per annum, whichever is greater, using the prime rate of major New York banks as quoted in The Wall Street Journal.

8. The prime rate as so quoted in The Wall Street Journal was stipulated by the parties to be as follows for the following periods:

August 1, 1988 - August 31, 1988	9-1/2%
September 1, 1988 - November 30, 1989	10%
December 1, 1988 - February 28, 1989	10-1/2%
March 1, 1988 0 July 31, 1989	11-1/2%
August 1, 1988 - November 14, 1989	12%

and that therefore the rate of interest applicable to said Promissory Note is as follows:

July 11, 1986 - July 31, 1988	9%
August 1, 1988 - August 31, 1988	11%
September 1, 1988 - November 30, 1989	11-1/2%
December 1, 1988 - February 28, 1989	12%
March 1, 1989 - July 31, 1989	13%
August 1, 1989 - November 14, 1989	12%

9. Said Promissory Note requires the debtors to pay a late charge in the amount of 5% of any payment not received within ten (10) days of its due date.

10. The terms of said Promissory Note provided a separate paragraph relating to the appropriate interest rate to be paid in the event of the debtors' default. The amount of such interest rate was left blank.

11. The terms of said Promissory Note allow the Pennebakers to recover from the debtors as a part of this debt their reasonable attorneys' fees in enforcing their rights and remedies in recovering this debt, in an amount not to exceed 15% of the outstanding balance, and also to recover all other reasonable expenses and costs incurred by the Pennebakers in exercising their rights and remedies upon the default of the debtors.

12. As security for the debtors' debt as evidenced by said Promissory Note, the debtors herein granted to William E. Anderson as the original Trustee for the benefit of the Pennebakers, a North Carolina Deed of Trust conveying a security interest in three tracts of property all being situated in Buncombe County, North Carolina and hereinafter described as Tract I, Tract II and Tract III. Pursuant to the terms of said Deed of Trust, the claim of the Pennebakers in this bankruptcy is a secured claim to the extent of the property described in said Deed of Trust.

13. The terms of the Promissory Note and Deed of Trust state that any payments by the debtors or credits granted the debtors shall be applied first to costs, then to accrued interest, and finally to the outstanding principal balance of the debt.

14. The Promissory Note was given by the debtors to finance their purchase from A.E. Pennebaker of two tracts of property located in Buncombe County. The purchase was pursuant to the terms of a contract entered into between debtors and A.E. Pennebaker on or about June 7, 1986.

15. In entering into this contract, debtors were not under duress, undue influence or coercion, and entered into said contract of their own free will and of the own free act and deed.

16. The contract states that the purchasers, the debtors, were to be responsible for all of the ad valorem property taxes for said tracts of property for the calendar year 1986.

17. The closing for the conveyance of property pursuant to the contract took place on or about July 11, 1986. The closing documents, including the Promissory Note and the Deed of Trust referenced above, were prepared by William E. Anderson of Asheville, North Carolina, who was debtors' attorney.

18. The debtors made the following payments each in the amount of \$4,470.00 within the time allowed under the Promissory Note:

the payment due August 1, 1986;
the payment due September 1, 1986;
the payment due October 1, 1986;
the payment due November 1, 1986;

the payment due December 1, 1986;
the payment due January 1, 1987.

19. The debtors made the payment due on February 1, 1987 on February 16, 1987 in the amount of \$4,470.00, along with the late payment charge in the amount of \$223.50.

20. The debtors made the payment due on March 1, 1987 in the amount of \$4,470.00 within the time allowed under the terms of the Promissory Note.

21. The debtors made the payments due on April 1, 1987, May 1, 1987 and June 1, 1987 but made said payments on April 20, 1987, May 20, 1987 and June 22, 1987 respectively each in the amount of \$4,470.00, along with the late payment charge of \$223.50 in each instance.

22. The debtors failed to make the payment due on July 1, 1987 within the period of the time allowed under the terms of the Promissory Note. However, the debtors did pay \$2,235.00 on July 20, 1987 and paid \$2,458.50 on July 27, 1987, the total of said payments being the \$4,470.00 for the July 1, 1987 payment plus the \$223.50 for the late payment charge for said payment not having been timely made.

23. Since the aforesaid payment made on July 27, 1987, the debtors have made no payments of any kind under the terms of the Promissory Note, or for the debt evidenced by the Promissory Note and all payments beginning with the payment due on August 1, 1987 have been missed and not paid.

24. On February 25, 1988, Barbara A. Heck, Substitute Trustee on the aforementioned Deed of Trust for the benefit of

the Pennebakers, instituted foreclosure proceedings against the debtors in order to foreclose on and sell the property described in said Deed of Trust for the purpose of satisfying the debt evidenced by the Promissory Note.

25. On March 18, 1988, Robert H. Christy, Jr., Assistant Clerk of Superior Court for Buncombe County, North Carolina, in his judicial capacity, entered an Order permitting foreclosure under the Deed of Trust and sale of all three tracts described in the Deed of Trust. From said Order, the debtors appealed to the General Court of Justice, Superior Court Division sitting in Buncombe County, North Carolina.

26. During the pendency of the appeal to Superior Court, the debtors and the Pennebakers came to an agreement through their respective counsel, whereby the debtors agreed not to contest the foreclosure and sale upon Tract I and Tract II, and to allow the sale of Tract I and Tract II to go forward, and agreed not to take any actions to prevent or void the sale of Tract I and Tract II as described in the Deed of Trust and whereby the Pennebakers agreed to delay any advertisement of sale for 90 days and upon such sale to give the debtors credit in the amount of \$500,000.00 or the amount actually realized at the public sale of Tract I and Tract II, whichever is greater against the total outstanding balance of the debt which includes accrued interest and costs.

27. The matter of foreclosure came on for hearing in the General Court of Justice, Superior Court Division and upon the

trial of said matter, the Honorable W. Terry Sherrill, Superior Court Judge Presiding, on July 26, 1988, entered an Order permitting foreclosure under the Deed of Trust and sale of all three tracts described in the Deed of Trust and holding that Tract III as described therein does as a matter of law serve as security for the debt evidenced by the aforementioned Promissory Note. From said Order, the debtors herein appealed to the North Carolina Court of Appeals but stipulated to allow the sale of Tract I and Tract II as described under the Deed of Trust.

28. On November 15, 1988, in accordance with notice duly given, a sale was conducted on the front steps of the Buncombe County Courthouse selling Tract I and Tract II as described in the Deed of Trust. After the passage of all applicable upset bid periods, said sale was closed on December 9, 1988. The amount of said sale as bid was less than \$500,000.00 and therefore the debtors were given credit against the accrued costs, taxes, interest and principal on the debt in the amount of \$500,000.00 pursuant to the agreement of the parties as referenced above.

29. The Pennebakers incurred court filing fees in the amount of \$41.00, publication costs in the amount of \$319.80, Trustee's commission in the amount of \$500.00 and North Carolina transfer tax deed stamps in the amount of \$500.00 through the date of the foreclosure closing. The Pennebakers have also incurred \$15,565.57 to the Buncombe County Tax Collector for paying all ad valorem property taxes which were the responsibility of the debtors to pay against the aforementioned property.

30. On June 6, 1989, the North Carolina Court of Appeals issued its Opinion affirming the Judgment of the Superior Court.

31. On June 29, 1989, debtors petitioned the North Carolina Supreme Court for discretionary review of the decision of the North Carolina Court of Appeals. That Petition was denied.

32. For the purpose of enforcing their rights and remedies against the debtors, the Pennemakers retained the law firm of Adams, Hendon, Carson, Crow & Saenger, P.A. of Asheville, North Carolina and during the period of November 11, 1987 to November 14, 1989 (the date of the filing of the Chapter 11 Petition), legal services were performed for the Pennebakers regarding the matter, including, but not limited to preparing foreclosure documents, doing background title work for the foreclosure, attending contested foreclosure hearings, and contested bond hearings regarding the foreclosure, conducting discovery in the Superior Court, preparing for trial and conducting a trial in Superior Court, negotiating and consummating the partial settlement regarding the foreclosure of Tract I and Tract II as set forth above, acting to preserve the collateral and maintain the insurance on the subject properties, closing the foreclosure sale, defending the appeal of the debtors to the North Carolina Court of Appeals and the North Carolina Supreme Court, resolving title problems on Tract I for the purposes of resale, and acting to realize the debt from the collateral, including preparation of documents and closings on the resales of Tracts I and II and conducting settlement negotiations in an attempt to resolve this

matter in its entirety. A breakdown of these fees has been provided in a supplement filed with the court.

33. In performing the services referenced above up to November 14, 1989, counsel for the Pennebakers expended 218.0 hours as follows:

S.J. Crow	-	7.0 hours
George Ward Hendon	-	.4 hours
Martin K. Reidinger	-	170.3 hours
Lori M. Glenn	-	23.9 hours
Bradley L. Hamlin	-	.6 hours
Paralegals	-	15.8 hours

That the firm of counsel for the Pennebakers customarily charges its clients at the following hourly rates:

S.J. Crow and George Ward Hendon	-	\$ 140.00/hour
Martin K. Reidinger	-	110.00/hour
Lori M. Glenn and Bradley L. Hamlin	-	90.00/hour
Paralegals	-	40.00/hour

and that the same are reasonable given the nature of the work and the prevailing market conditions in the area of Asheville and Buncombe County, North Carolina, and that the hours rendered for said services are reasonable.

34. The amount of \$22,606.00 is a reasonable amount for the attorneys' fees to be taxed against the debtors as part of the claim herein for the services performed and time expended up to November 14, 1989, the filing date of this Chapter 11 Petition.

CONCLUSIONS OF LAW

1. The debtors have asserted that because the rate of interest to be paid post-default was left blank, this creates an ambiguity in the contract. On the authority of Franklin Nat'l. Bank v. Roberts, 84 S.E. 706 (1915), the debtors argue that this

ambiguity should be resolved by implying the legal rate of interest. The court rejects this argument. In Franklin, the promissory note had no interest rate at all. Here, the parties clearly provided for an interest rate of prime plus 1-1/2%. The fact that the parties did not provide an additional interest rate to apply after default does not bring the rule in Franklin into play. Any ambiguity created by the blank term can be resolved easily by looking to the parties' intent as evidenced by the regular interest rate of prime plus 1-1/2%.

Accordingly, the rate of interest which accrues and has accrued on the debt evidenced by the Promissory Note, both before default and after default, is as follows: 9% per annum for the period of July 11, 1986 through July 31, 1988 and beginning August 1, 1988 at a rate of prime plus 1-1/2% or 10% per annum, whichever is greater, applied to the total remaining outstanding balance as of the due date of each payment, with the prime rate being defined as stipulated by the parties and set forth in the Findings of Fact above.

2. The debtors defaulted in the payment on said debt by their failure to pay the installment due on August 1, 1987 and all payments thereafter.

3. Any payments or credits made by the debtors to be applied against the debt under the terms of the Note and securing Deed of Trust shall be applied first to any costs incurred by the Pennebakers in realizing the funds due under said debt, including court filing fees, publication costs, Trustee's commissions,

transfer tax deed stamps and payment of back taxes which were the responsibility of the debtors, second to any accrued interest and third to any principal balance.

4. The agreement between the parties through their respective counsel whereby the Pennebakers were to give and did give a credit in the amount of \$500,000.00 against the debt from the foreclosure sale even though the sale did not bring that actual amount is enforceable against the parties and is applicable to the calculation of the amount of this claim of the Pennebakers in this bankruptcy.

5. The debtors are entitled to no credit for the pro rata portion of 1986 ad valorem property taxes for the pro rata period of January 1, 1986 to July 10, 1986 for Tract I and Tract II.

6. In entering into the aforementioned contract between the debtors and Alvin E. Pennebaker for the conveyance of real property, the debtors were not under duress, undue influence or coercion and entered into said contract of their own free will and of their own free act and deed.

7. This debt is secured by that property designated as Tract III as described in the Deed of Trust and as such, this is a secured claim.

8. The Pennebakers may recover, as a part of this claim, a portion of their attorneys' fees incurred in seeking to enforce their rights and to collect the debt of the debtors to the Pennebakers in an amount set by this court.

9. The amount of \$22,606.00 is a reasonable amount of attorneys' fees which the Pennebakers may recover for fees which they have paid to their attorneys for work in collecting upon this debt and attempting to realize the funds due under this debt for the work and services performed by the attorneys prior to November 14, 1989, the same being the date of the filing of this voluntary Chapter 11 Petition. The court finds these fees to be reasonable as calculated according to the market rates in the relevant community, and that the supplementary information filed with the court by Adams, Hendon, Carson, Crow & Saenger, P.A. is sufficient documentation of these fees.

10. The amount of the debt of the debtors to the Pennebakers and the amount of this claim as of November 14, 1989, the date of the filing of this Chapter 11 proceeding in accordance with the above stated Findings of Fact and Conclusions of Law is \$249,072.78, including said attorneys' fees.

11. The Pennebakers may move this court at a later date to amend their Proof of Claim to include reasonable attorneys' fees for the work and services performed by their attorneys after the date of the filing of this voluntary Chapter 11 Petition and for post-petition interest, and the amount of this claim may be amended by the court as such time as allowed by Title 11 of the United States Code.

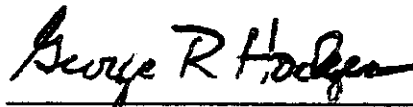
12. The proceeding from which this Order is rendered is a core proceeding within the meaning of 28 U.S.C. § 157.

It is therefore ORDERED that:

1. The claim in this bankruptcy of Edward C. Pennebaker, O.I. Pennebaker, George Ann Pennebaker and the Estate of A.E. Pennebaker is hereby adjudged to be in the amount of \$249,072.78 as of November 14, 1989 and the Proof of Claim of the Pennebakers and the objection of the debtors herein to the extent they are in accordance with said amount are hereby sustained and to the extent that the same differ from said amount, they are overruled.

2. The Pennebakers later in these proceedings shall move to amend their Proof of Claim to reflect the reasonable fees of their attorneys for work and services performed after November 14, 1989 and interest accrued under the Note after said date and the court shall amend this order to include any applicable amounts for said items at that time.

This the 11th day of July, 1990.



George R. Hodges
United States Bankruptcy Judge